Supreme Court, U.S.
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Docket Number _____

SUPREME COURT OF THE UNITED STATES

TAMARA RHINEHART,

Petitioner,

vs.

STATE OF UTAH,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UTAH STATE SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Utah Supreme Court's decision to deny Petitioner's Petition for Interlocutory Appeal is in conflict with the United States Constitution.

2. Whether the Utah Supreme Court's decision in denying Petitioner's Petition for Interlocutory Appeal is in conflict with this Court's decision and has so far departed from this Court's holding in Crawford v. Washington, 124 S. Ct. 1354 (March 8, 2004), as to call for an exercise of this Court's supervisory power.

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CITATIONS OF OPINIONS BELOW

The Order and Judgment of the Utah Supreme Court below was not published. It was entered on August 13, 2004, under State of Utah v. Rhinehart, docket #20040635-SC. A copy of this decision is attached in the appendix hereto.

The Order Denying Defendant's Motion to Quash Bindover of the First Judicial District Court for the State of Utah, is unreported. It was entered on June 3, 2004 and clarified on July 14, 2004, under State of Utah v. Rhinehart, Case #031100633 and Case #031101017. A copy of this decision is attached in the appendix hereto, in the transcript of the oral ruling.

STATEMENT OF JURISDICTION

The jurisdiction of the United States Supreme Court is defined in Article III of the Constitution of the United States. The Utah Supreme Court entered its Order and Judgment denying Petitioner's Petition for Interlocutory Appeal on August 13, 2004. No petition for a rehearing was made. The United States Supreme Court has jurisdiction to review this order and judgment of the Utah Supreme

Court pursuant to 28 U.S.C. §1254.

CONSTITUTIONAL PROVISIONS, TREATISES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED IN THE CASE

The United States Constitution, Amendment VI, provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

STATEMENT OF THE CASE

The matter was briefed by the parties in the Utah Supreme Court and that court entered its Opinion on August 13, 2004, denying the Petition for Interlocutory Appeal. (Appendix p. 22).

ARGUMENT

POINT I: STANDARD OF REVIEW

Petitioner's entire appeal is based upon an analysis of her rights under the United States Constitution. For this reason, she is entitled to de novo consideration of all issues raised in this appeal.

POINT II: FACTS OF THE CASE

1. This is a capital murder proceeding. The case is prosecuted in the First Judicial District Court in Cache County, State of Utah. No trial has occurred. The case was heard in a preliminary hearing in the trial court over multiple days in February, 2004. The trial court bound the matter over for trial. Defendant moved the trial court to quash the bindover from the preliminary hearing.

2. The trial court denied Defendant's motion to quash the bindover at a hearing held May 10, 2004.

3. Petitioner petitioned the Utah Supreme Court to accept the case on interlocutory appeal to challenge the bindover. This petition was denied.

4. Defendant seeks review of the Utah Supreme Court's refusal to review bindover from the preliminary hearing. Defendant ultimately seeks review of the trial court's determination to allow hearsay statements to be introduced

against Defendant at preliminary hearing, as the totality of the State's substantive case at preliminary hearing.

POINT III: RELEVANT PROCEDURAL HISTORY AND FACTS

This capital murder case came on for preliminary hearing before the trial court on February 5, 6 and 11, 2004. At the conclusion of the hearing on February 11, the State presented an Amended Information, charging five counts in addition to the lone aggravated (capital) murder charge brought in the original charging document. The trial Court ordered the defendant bound over for trial on the aggravated murder charge.

At the preliminary hearing of the capital murder charge, the State relied primarily on written hearsay statements from two sources: Jessica Goalen and Craig Nicholls. Both individuals are alleged to be accomplices to the capital murder. Both individuals were subpoenaed by the defendant to be questioned at the preliminary hearing. The lower court found both individuals to be legally unavailable to testify based upon their assertions of the

constitutional right to remain silent, as each had been advised to do by counsel.

Craig Nicholls is a co-defendant of Ms. Rhinehart. He was the principle actor and actual assassin in the murder. He entered a guilty plea pursuant to a negotiated settlement which spared him the death penalty. A notice of plea bargain Rule 11 waiver/statement of facts was offered as State's Exhibit 23, and accepted at preliminary hearing over defendant's objection. The plea statement was created by prosecutors for the State and ostensibly signed by Mr. Nicholls on November 10, 2003.

On November 12, 2003 Mr. Nicholls participated in an interview with police about the murder he had committed. This police statement was recorded by a professional court reporter, though no attorney was present and no opportunity for cross examination was provided to Petitioner here. The interview transcript was offered as State's Exhibit 26 at the preliminary hearing, and was admitted over defendant's numerous objections. The Nicholls Interview is 87 pages long. In the Interview, Mr.

Nicholls refers to statements in his Plea Statement as not accurate, and comments that he doesn't know who wrote them. Additionally, Mr. Nicholls later filed a motion with the trial court to withdraw his guilty plea, citing confusion and coercion in the plea process. The documents associated with Mr. Nicholls' motion to withdraw his plea were received into evidence as a defense exhibit at the preliminary hearing.

Jessica Goalen is an alleged co-accomplice in the murder. Ms. Goalen was questioned by police, and according to the testimony and interpretation of officers, initially lied. (It is critical to note that those "lies" were exculpatory to Defendant here.) She was questioned a second time, and after being threatened by police with prosecution, and then allegedly gave different information which inculpated herself as well as Mr. Nicholls and Ms. Rhinehart. On a third occasion, Ms. Goalen was questioned at the police department. The interview was conducted by police officers and recorded by a certified reporter in the style of a deposition, though no attorney was present and there was no opportunity provided Petitioner for cross

examination. A transcript of the interview was offered into evidence as State's Exhibit 24 and admitted at the preliminary hearing over numerous objections by the defendant. The interview is 135 pages long, and ends with Ms. Goalen asking if she is going to need an attorney, and the police then immediately suggesting that they "go off the record" to discuss such concerns. Early in the interview, police inform Ms. Goalen that the approach they are taking is the best specifically because it will save her from having to testify at the Defendant's preliminary hearing. Law enforcement and the prosecution thus proactively attempted to thwart confrontation and cross-examination of testimonial evidence by Rhinehart at her capital murder preliminary hearing.

Other hearsay was also offered into evidence and admitted over the objections of the defendant. Such evidence includes a partial transcript of a telephone interview of one Marnie Christianson by police admitted as State's Exhibit 29. Also admitted as "reliable hearsay" were a statement of Shawn Iverson (State's Exhibit 1), and a statement of Sue Davis (State's Exhibit 26).

Most of the hearsay statements themselves include further tiers of hearsay, as well as otherwise inadmissible content resulting from leading questioning and conclusory statements lacking in foundation. The State relied utterly on testimonial hearsay, and principally the interviews of Goalen and Nicholls, to support the murder charge against Rhinehart.

POINT IV: THE HEARSAY EVIDENCE WAS ADMITTED AT PRELIMINARY HEARING IN VIOLATION OF RHINEHART'S CONSTITUTIONAL RIGHTS

A. Confrontation

Rhinehart was denied her constitutional right to confront and cross examine the hearsay declarants at preliminary hearing pursuant to the Sixth Amendment to the United States Constitution. On March 8, 2004 the United States Supreme Court, in Crawford v. Washington, 124 S. Ct. 1354 (March 8, 2004), reaffirmed that the right of confrontation is plenary and allows for no exceptions where testimonial hearsay is implicated.

In Crawford, this Court held unequivocally that:

> Where testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.
>
> * * *
>
> Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.

Id. at paragraph 19. In reaching the Crawford holding, the Court reviewed the full history of the confrontation right, determining that its significance cannot be understated. The Court reiterated that the particular value inherent in confrontation lies within its unique power to test the credibility and reliability of testimony. Thus, rules of evidence or other legislative or judicially-created doctrines developed to assess "reliability" and which may allow for the admission of testimonial hearsay, are superceded by the United States Constitution and are a nullity where testimonial hearsay is sought to be introduced against a criminal defendant:

> Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of "reliability." . . . Admitting

> statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.

Id at paragraph 14. In fact, the Court held that, where a court finds reliability based upon factors such as the fact that a statement is made to police against penal interest, or that it was given under oath, insult is added to injury, since "the single safeguard missing is the one the Confrontation Clause demands." Id. at paragraph 16.

The absolute right to confront and cross examine witnesses at a preliminary examination[1] has long been recognized in Utah. The most exhaustive examination of the right is found in State v. Anderson, 612 P.2d 778 (Utah 1980). There, the State sought to proceed at a preliminary examination partly by way of an affidavit containing testimonial hearsay, citing to then-existing U.C.A. § 77-

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[1]The phrases "preliminary hearing" and "preliminary examination" are used interchangeably in the statutes, rules and case law, and will be so used herein.

15-19. The Utah Supreme Court held a preliminary hearing is a critical stage in the criminal process, and requires the application of substantive and procedural constitutional rights, including especially the rights afforded under the Confrontation Clause.

> Our review of the nature and purpose of the preliminary examination illustrates the critical character of the proceeding in relation to various substantive rights of the defendant which are subject to infringement by the exclusion of certain procedural safeguards at this step in the criminal prosecution. Recognizing the "critical" character of this proceeding the Supreme Court has extended the right of counsel (as embodied in the Sixth Amendment of the Federal Constitution) to [the preliminary hearing]. . . . The protections afforded by the right of confrontation at the preliminary examination are equally important and so inter-related to the right of effective counsel and the presentation of a defense that they must be guaranteed the accused at the preliminary hearing.

Id at 784-85, *citing* Coleman v. Alabama, 399 U.S. 1 (1969), United States v. Wade, 388 U.S. 218 (1967), and other federal cases which have been omitted.

In so ruling, the Utah Court in Anderson relied on historical and procedural considerations mirroring those expressed in Crawford. The holding in Anderson is founded on both State and

Federal Constitutional principles. The fundamental importance of the right of confrontation was tied inherently to others inimitable rights such as the right to counsel, the right to discovery, and ultimately the right to due process and a fair trial.

> If the preliminary hearing is to retain any meaningful significance in the criminal prosecution and provide an effective means of weeding out improvident prosecutions, the protections attendant the defendant's right to present an affirmative defense cannot be circumvented by allowing the prosecution to base its showing of probable cause on hearsay evidence. . . .The recognition of the right of confrontation at the preliminary examination merely demands the prosecution's use of hearsay evidence at the hearing may not circumvent the defendant's substantive rights to a fair hearing and a fair trial, by denying the defendant an opportunity to cross-examine the witnesses who offer testimony at the hearing.

Id. at 786, (citations omitted.)

In 1995 Article 1, Section 12 of the Utah Constitution was amended, adding language about the use of so-called "reliable hearsay" at preliminary examinations. Concurrently, Rule 1102 was added to the Utah Rules of Evidence, purporting to allow "reliable hearsay" at the preliminary examination, and providing specific examples of what such hearsay might include. According to the

Advisory Committee Note to Rule 1102, there was an intent in its passage of abrogating Anderson only to the extent that its holding was inconsistent with the new Rule. However, since Anderson is based upon federal constitutional principles, which principles have primacy over any state rule to be to the contrary, Anderson remains the law. To the extent that anything in the 1995 amendment to Article 1, Section 12 of the Utah Constitution or Rule 1102 is inconsistent with Crawford, it is unconstitutional under the federal constitution.

The federal constitutional underpinnings of Anderson are likely responsible for the fact that the Utah Supreme Court has maintained fidelity to the holding therein. The Utah Supreme Court declined the invitation of various amicus parties in State v. Pledger, 896 P.2d 1226, 1228 (1995) to overrule Anderson.[2] And

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[2] Ironically, in so doing, the Court misstated the "federal rule" in footnote 4, stating that the protections afforded criminal defendants by the Confrontation Clause do not extend to preliminary hearings, citing to Gerstein v. Pugh, 420 U.S. 103, 120-122 (1975). Gerstein in fact specifically reaffirms the application of the Clause to preliminary

notwithstanding the amendment to Article 1, Section 12 and the creation of Rule 1102, the Utah Supreme Court has continued to reference the critical nature of the preliminary examination, the various collateral purposes therefor, and the attachment thereto of the defendant's right of confrontation. See, e.g., State v. Talbot, 972 P.2d 435, 438 (1999).

Based upon the foregoing, and especially the recent holding in Crawford, none of the testimonial hearsay offered by the State at the preliminary hearing in these matters should have been admitted. Doing so violated Rhinehart's federal constitutional rights in a critical stage of a capital murder prosecution. Absent the unconfronted hearsay, the evidence was insufficient to support a

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hearings of the sort at issue here, citing to the same United States Supreme Court precedent upon which Anderson is based. Gerstein simply distinguished those "preliminary hearings" the sole purpose of which is to determine whether a defendant can be detained, and holds that the Clause does not apply to simple detention hearings, even though there is a requirement that a magistrate make a probable cause finding. The confusion results in the loose use of the phrase "preliminary hearing."

bindover. The trial court erred in failing to quash the bindover. The Utah Supreme Court erred in failing to grant review.

B. The Hearsay In Issue is Inherently Unreliable

Crawford is an indictment of the very concept of judicially determined "reliability". The concerns there expressed have significant relevance to the particular sort of hearsay admitted in the present case. For instance, Goalen and Nicholls are alleged accomplices in a capital murder. Nicholls was charged and became an informant witness in exchange for his very life, perhaps the greatest incentive an informant can have to lie in favor of the prosecution. Goalen is someone the State identifies as an accomplice. Thus, she also faced the risk of capital murder charges, though she was never charged. The statements of such persons have long been considered to be *inherently unreliable* as a matter of law. See, e.g., Bruton v. United States, 391 U.S. 123 (1968); Cruz v. New York, 481 U.S. 186 (1987). (Bruton is cited with approval in Crawford at paragraph 12). The Court in Crawford specifically stated that state courts seemed to admit such testimony despite the

fact that the Confrontation Clause "plainly meant to exclude" it. Id. at paragraph 15, *citing* many state court decisions. The Court commented that, [t]o add insult to injury, some of the courts that admit untested testimonial statements find reliability in the very factors that *make* the statements testimonial, . . ." such as statements made under oath. Id. at paragraph 16.

The very same factors were relied upon at the preliminary hearing below to admit the testimonial hearsay complained of. Crawford makes clear that, even if a reliability review were allowable, which it is not, the statements involved here are quintessentially unreliable. Admitting them into evidence violated defendant's federal due process rights, in addition to the infringement on her federal Sixth Amendment rights.

The hearsay admitted at the preliminary hearing was admitted due to constitutional error. Because the bindover decision was entirely based thereon, this Court should grant defendant's petition for review, as the Utah Supreme Court has failed to do so.

POINT V. REASONS FOR GRANTING CERTIORARI

Petitioner raised all these issues to the Utah Supreme Court, which summarily considered the matter and summarily declined to grant review under an interlocutory appeal. For the State's highest court to give such short shrift to these weighty constitutional issues of first impression was improper.

Moreover, the Utah Supreme Court may have been swayed by arguments in opposition to the Petition for Interlocutory Appeal, to the effect that the trial court had ruled it would have found probable cause to bindover Petitioner for trial, irrespective of the unconstitutional hearsay evidence admitted. This was an absolute misrepresentation by the prosecuting authority to the Utah Supreme Court. The trial court had previously ruled orally exactly to the contrary–that the trial court actually relied upon the unconfronted hearsay to bindover Petitioner from the preliminary hearing. The trial court has subsequently clarified this position in writing, but the Supreme Court in Utah was never made aware of this misrepresentation by the state.

In addition, this interlocutory course of review is the only possible avenue for Petitioner to have her concerns addressed on these weighty issues. If she is tried in the capital murder case, and convicted, the use of unconstitutional evidence to bind her over will likely be deemed to have merged with the conviction, and she will be denied a further consideration of this issue in any venue.

Because this case involves an issue of gross misinterpretation of the Sixth Amendment, and because the opinion of the lower state court grossly misinterprets this Court's holding in Crawford, supra, this is an issue critical to determine the federal constitutional rights of citizens, and this court is a death penalty case where Defendant is entitled to "super due process," this Court should grant certiorari.

RESPECTFULLY SUBMITTED this 9 day of November, 2004.

CORPORON & WILLIAMS, P.C.

MARY C. CORPORON
Attorney for Petitioner

APPENDIX

Article I, Section 12 of the Utah Constitution, 1995 as amended.

. . . Where the defendant is otherwise entitled to a preliminary examination, the function of that examination is limited to determining whether probable cause exists unless otherwise provided by statute. Nothing in this constitution shall preclude the use of reliable hearsay evidence as defined by statute or rule in whole or in part at any preliminary examination to determine probable cause or at any pretrial proceeding with respect to release of the defendant if appropriate discovery is allowed as defined by statute or rule.

RULE 1102. Reliable hearsay in criminal preliminary examinations.

(a) *Statement of the rule.* Reliable hearsay is admissible at criminal preliminary examinations.

(b) *Definition of reliable hearsay.* For purposes of criminal preliminary examinations only, reliable hearsay includes:

(b)(1) hearsay evidence admissible at trial under the Utah Rules of Evidence;

(b)(2) hearsay evidence admissible at trial under Rule 804 of the Utah Rules of Evidence, regardless of the availability of the declarant at the preliminary examination;

(b)(3) evidence establishing the foundation for or the authenticity of any exhibit;

(b)(4) scientific, laboratory, or forensic reports and records;

(b)(5) medical and autopsy reports and records;

(b)(6) a statement of a non-testifying peace officer to a testifying peace officer;

(b)(7) a statement made by a child victim of physical abuse or a sexual offense which is promptly reported by the child victim and recorded in accordance with Rule 15.5 of the Utah Rules of Criminal Procedure.

(b)(8) a statement of a declarant that is written, recorded, or transcribed verbatim which is:

(b)(8)(A) under oath or affirmation; or

(b)(8)(B) pursuant to a notification to the declarant that a false statement made therein is punishable;

(b)(9) other hearsay evidence with similar indicia of reliability, regardless of admissibility at trial under Rules 803 and 804 of the Utah Rules of Evidence.

(c) *Continuance for production of additional evidence.* If hearsay evidence is proffered or admitted in the preliminary examination, a continuance of the hearing may be granted for the purpose of furnishing additional evidence if:

(c)(1) The magistrate finds that the hearsay evidence

proffered or admitted is not sufficient and additional evidence is necessary for a bindover; or

(c)(2) The defense establishes that it would be so substantially and unfairly disadvantaged by the use of the hearsay evidence as to outweigh the interests of the declarant and the efficient administration of justice.

(Added effective April 1, 1999).

IN THE SUPREME COURT OF UTAH

State of Utah,
Plaintiff and Respondent,

vs.

CASE NO. 20040511-SC

Tamara Rhinehart,
Defendant and Petitioner.

NOTICE OF DECISION

The above-entitled case was submitted to the court for decision and the attached order has been issued.

Order Issued: August 11, 2004

Notice of Decision Issued: August 13, 2004

Record: NONE

FIRST DISTRICT, LOGAN DEPT. #031101017

DATED August 13, 2004.

"s/ Pat H. Bartholomew"
Clerk of Court

IN THE SUPREME COURT OF UTAH

State of Utah,
Plaintiff and Respondent,

vs.

CASE NO. 20040511-SC
031101017

Tamara Rhinehart,
Defendant and Petitioner.

ORDER

This matter is before the court upon a petition for permission to appeal from an interlocutory order, filed on June 17, 2004.

IT IS HEREBY ORDERED pursuant to Rule 5(e) of the Utah Rules of Appellate Procedure the petition is denied.

DATED August 11, 2004.

For the Court:

"s/ Christine M. Durham"
Chief Justice

IN THE FIRST JUDICIAL DISTRICT COURT,
IN AND FOR THE COUNTY OF CACHE, STATE OF UTAH.

STATE OF UTAH,
Plaintiff

vs. **Case nos. 031100633**
031101017

TAMARA RHINEHART,
Defendant.

RULING ON MOTIONS

THE ABOVE MATTER came before the court on June 26, 2004, for oral argument on the State's Motion to Join Case No. 031100633 and Case No. 031101017: Defendant's Motion in Limine to Exclude Photographs of the Deceased; and Defendant's Objection to Bindover Order and Order Denying Defendant's Motion to Quash Bindover. The State was represented by George Daines and James Swink. Defendant was present and represented by her appointed attorneys Mary Corporon and Scott Williams. The court has considered the arguments provided by counsel and thoroughly reviewed the parties' memoranda, the relevant case law, and all applicable statutory provisions. Now being fully advised, the court makes the following ruling on the motions presented.

Motion to Join Cases

In its motion dated February 24, 2004, the State requested the court to join two cases pending against Defendant pursuant to section 77-8a-1 and State v. Mead, 2001 UT 58, 27 P.3d 1115. According to the State, joinder is appropriate for reasons of economy and the practicalities of judicial administration and because (1) the conduct involved in both cases is connected, (2) both cases form a part of a common scheme or plan, and (3) evidence from both cases would be admissible in either case if the cases were tried separately. During oral argument, however, the

State ameliorated its request by stating that it would agree not to join the two cases so long as the case involving the burglary charges (case no. 017) could be tried before the case involving the aggravated murder charges (case no. 633).

Defendant responded by arguing that joinder of the two cases is inappropriate not only because the facts involved are neither part of a single criminal episode nor indicative of a common scheme or plan, but also because joinder of the cases would permit the jury to hear evidence of the burglary while Defendant is being tried for aggravated murder.[1] This would be arguably prejudicial because hearing evidence of another crime while being tried for aggravated murder could lead the jury to convict Defendant of aggravated murder based upon a belief that she is a bad person for having committed a burglary. Moreover, joinder would also be unfair to Defendant because, if the two cases were tried separately, Rule 403 and Rule 404(b) of the Utah Rules of Evidence would preclude the State from introducing evidence of the burglary during the aggravated murder trial.

With respect to the order of the trials, Defendant argued that the aggravated murder charge should be severed from all other alleged offenses and tried first, as this is proper from the point of view of judicial economy because if Defendant is convicted, it is highly unlikely that the State would then expend additional resources pursuing the other less serious, charges. In addition, according to Defendant, the only reason the State wants to try case no. 017 first is to use the conviction in that case to bolster its penalty phase case during the aggravated murder trial. Additionally, trying case no. 017 first would inevitably taint the jury pool for case no. 633, requiring a change of venue to Box Elder County. This

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[1]Defendant also argued that given the heightened reliability considerations required in death penalty cases, the aggravated murder charge should be severed from all of the other charges in both cases.

would be unfair, Defendant argues, because a jury selected from Box Elder County would be more likely to impose a harsher sentence upon Defendant than a jury in Cache County.

The Utah Code of Criminal Procedure gives the trial court judge discretion to "order two or more . . . informations . . . to be tried together if the offenses . . . could have been joined in a single . . . information." Utah Code Ann. § 77-8a-1(3)(a). Offenses may be joined in a single information "if each offense is a separate count and if the offenses charged are: (a) based on the same conduct or are otherwise connected together in their commission; or (b) alleged to have been part of a common scheme or plan." Utah Code Ann. § 77-8a-1(1). However, even if the trial court determines that the offenses charged in two separate informations may be tried jointly, "[i]f the court finds a Defendant or the prosecution is prejudiced by a joinder of offenses . . the court shall order an election of separate trials of separate counts . . . or provide other relief as justice requires." Utah Code Ann. § 77-8a-1(4)(a).

Applying the statutory criteria to this case, based upon the evidence presented at the preliminary hearing, the court finds that the offenses charged in case no. 017 and case no. 633 could have been joined in a single information. Although the offenses charged in these two informations occurred roughly one months apart, there is support for Plaintiff's argument that there is evidence demonstrating that the crimes were part of a common scheme or plan. *See* Utah Code Ann. § 77-8a-1(1)(b). Each of the alleged offenses involved the same actors–Defendant and Craig Nicholls–cooperating extensively with one another to allegedly concoct a plan for the single purpose of getting money or items of value from Defendant's former husband as well as her aunt. It is alleged that Defendant gathered information and selected a relative in Cache Valley as the victim, she informed Mr. Nicholls of her aunt and the valuables her aunt possessed in a safe in her home, she also informed Mr. Nicholls of her former husband and the fraudulent insurance policies she obtained, and both Defendant and Mr. Nicholls desired to divide the fruits of their crimes with each

other.

As noted above, Defendant argues that she will be prejudiced by a joinder of offenses in a single trial because, if the jury hears evidence of other alleged crimes while being tried for aggravated murder and the jurors conclude that she in fact committed these other crimes, then even if the jurors could not conclude beyond a reasonable doubt that she committed aggravated murder, they would likely still convict her of aggravated murder based upon the inevitable perception that she is a bad person for having committed the other crimes or have engaged in improper conduct. This argument is unpersuasive, particularly in view of the fact that it relies upon a less-then-fair assessment of jurors' abilities to perform their duty to make faire and impartial judgments based upon the evidence presented at trial and the court's instructions concerning the applicable law. Joinder of offenses in this case is permissible based upon the State's argument that the offenses are "alleged to have been part of a common scheme or plan," Utah Code Ann. § 77-8a-1(1), and the court's conclusion that Defendant will not be unfairly prejudiced by having the offenses charged in the two informations tried jointly.

For the foregoing reasons, the States Motion to Join Case No. 031100633 and Case No. 031101017 is granted. In light of this ruling, Defendant's request to bifurcate the two cases is necessarily denied, as is her request to have the aggravated murder count severed from the other charged offenses.[2]

Motion to Exclude Photographs

On May 6, 2004, Defendant filed a motion in limine requesting the trial court to exclude photographs of the deceased.

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[2]This ruling also renders moot the arguments raised concerning issues of change of venue. Moreover, it avoids the appearance of the court inappropriately manipulating the case in order to solve evidentiary issues related to either phase of the capital trial.

Defendant arguers that the photographs the State seeks to admit do not demonstrate who shot the decedent, but relate solely to uncontested facts, for example, that the deceased was shot and what his body position was at the crime scene. Because these facts are uncontested, the photographs are irrelevant because they do not tend to make more or less probable a fact of consequence in the case. She further argues that even if the photographs are relevant, they should be excluded under Rule 403 of the Utah Rules of Evidence. Given the gruesome nature of the photographs, their probative value is, according to Defendant, substantially outweighed by the danger of unfair prejudice. Moreover, admission of the photographs would amount to nothing more than the unnecessary presentation of cumulative evidence since the same uncontested facts can easily be set before the jury by means of verbal testimony.

The State responded by arguing that the photographs are relevant for purposes of corroborating the testimony of Craig Nicholls. In addition, the State contends that the photographs are not gruesome in nature and do not amount to the presentation of needlessly cumulative evidence. Although information about the death of the decedent may be expressed through verbal testimony, the State also maintains that the photographs provide a degree of understanding that oral testimony does not. Nevertheless, during oral argument, the State conceded that if Mr. Nicholls testified, many of the photographs will not have to be admitted. On the other hand, because Defendant will not conceded or stipulate that Mr. Nicholls was the shooter, if Mr. Nicholls refuses to testify, then the photographs will be essential to substantiating the prior statements made by Mr. Nicholls to State investigators indicating that he was the one who shot the decedent. Whether Mr. Nicholls testifies, however, and exactly what the content of his testimony will be if he does testify will only be known at the time of trial.

Based upon the representations made by both parties during oral argument, the issues raised in Defendant's motion will only become ripe after it is known whether Mr. Nicholls testifies and, if so, what the content of his testimony will be.

Objection to Bindover Order

On June 9, 2004, Defendant filed a motion objecting to the second paragraph of the Bindover Order and paragraph 18 of the Order Denying Defendant's Motion to Quash Bindover, both of which were filed by the State on June 3, 2004. According to Defendant, these two paragraphs make the erroneous finding that even if the Nicholls and Goalen hearsay statements[3] were segregated from the other evidence presented at the preliminary hearing and not considered as part of the bindover determination, there would still be sufficient evidence to establish probable cause to believe that the charged crimes were in fact committed and that Defendant committed them. Defendant argues that although the so-called "segregation" issue was raised by the State at the hearing convened on May 10, 2004, the court specifically declined to rule on the issue and invited the State, if it so desired, to treat the issue further by way of memorandum. Since the court did not rule on the segregation issue, Defendants requests that the two paragraphs purporting to make a finding with respect to the segregation issue by stricken.

During oral argument on June 22, 2004, the State asserted that it has always argued that there is sufficient evidence to bind Defendant over on the charged offenses even without the Nicholls and Goalen hearsay statements and that the paragraphs objected to simply reflect that position. The prosecutor further asserted that he did not recall the court requesting him to submit a memorandum on the segregation issue. Rather, it was his understanding that the court would review the evidence in light of the segregation issue and then decide whether to sign the orders with the segregation findings included.

At the May 10th hearing, in ruling on Defendant's motion to

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[3]These statements include: (1) State's Exhibit No. 25–Nicholls Interview; State's Exhibit No. 25–Goalen Interview; and State's Exhibit No. 23–Nicholls Rule 11 Waiver/Statement.

quash the bindover order, the court specifically stated that Crawford v. Washington, U.S. 124 S. Ct. 1354, 158 L. Ed.2d 177 (2004) had no application to preliminary examinations and could not, therefore, be grounds for excluding consideration of the Nicholls and Goalen hearsay statements. In addition, the court also stated that the Nicholls and Goalen hearsay statements fully satisfied the requirements of Rule 1102 of the Utah Rules of Evidence and, therefore, were properly admitted during the preliminary examination and properly considered by the court in making the probable cause determination. With respect to the segregation issue raised by the State, although the court indicated that there was substantial evidence outside the hearsay statements in support of a finding of probable cause, the court also stated that its probable cause determination was based upon a consideration of all of the evidence and not in light of the segregation issue. The court suggested to both the prosecutor and Defendant that they could submit a memorandum on the issue and allow the court to make a ruling at a later date. Although since the May 10th hearing the Court has analyzed the evidence in view of the segregation issue, the court did not receive any memoranda from the parties addressing the segregation issue and has had no opportunity to make a ruling.

In light of the foregoing circumstances, the court grants Defendant's request to strike paragraph two of the Bindover Order and paragraph 18 of the Order Denying Defendant's Motion to Quash Bindover.

DATED July 14, 2004.

BY THE COURT

"s/ Gordon J. Low"
First Judicial District Court Judge

IN THE FIRST JUDICIAL DISTRICT COURT,
IN AND FOR THE COUNTY OF CACHE, STATE OF UTAH.

STATE OF UTAH,
Plaintiff

vs. **Case nos. 031100633**
031101017

TAMARA RHINEHART,
Defendant.

ORDER DENYING DEFENDANT'S MOTION TO QUASH BINDOVER

The Court, after review and consideration of the Defendant's Motion to Quash, the State's Response to the Defendant's Motion to Quash, and the oral argument presented to the Court on May 10, 2004, now makes the following findings of fact, conclusions of law and order:

FINDINGS OF FACT:

1. On February 5, 6, 11, and 27, 2004, a preliminary hearing was conducted in the above entitled matter.

2. On February 6, 2004, the State concluded its presentation of evidence. At the request of the defense so they would have additional time to present additional witnesses, the Court continued the hearing to February 11, 2004.

3. On February 11th, prior to the conclusion of the preliminary hearing, the State filed a Second Amended Information charging the defendant with one court of aggravated murder, one court of forgery, and four counts of communications fraud. The State requested the Court to bind the defendant over for trial on all six counts contained in the Second Amendment Information in case

#031100633 (North Logan homicide) and on all three counts in the Information in case #031101017 (the Providence burglary).

4. On February 112, 2004, the defendant presented her case, and at the conclusion of the hearing, the Court bound the defendant over on the crime of criminal homicide, aggravated murder, a capital offense, finding that the crime was committed and that the defendant committed it. *See Preliminary Hearing Transcript, vol. 3, p. 61.* The Court withheld ruling on the bind over of the remaining counts and requested the State prepare a memorandum detailing what evidence had been presented during the preliminary hearing that supported the remaining charges contained in the Amended Information filed in case #031100633 and the Information filed in case #031101017. The Court provided time for the defendant to respond to the State's memorandum and set a hearing for February 27, 2004, where the defendant could present any additional evidence or information to the Court.

5. On February 13, 2004, the State filed its Post Preliminary Hearing Memorandum detailing the evidence presented by the State that supported each of the remaining counts which had not been bound over for trial. The defendant did not file a response to the State's memorandum nor did the defendant call any further witnesses at the hearing held on February 27, 2004.

6. On February 27, 2004, the Court found that probable cause was established and existed for each of the crimes charged in the remaining counts in both cases and that they were committed by the defendant. The Court bound over the defendant on the charges in both cases and required her to appear to answer to those charges before the district court. *See Preliminary Hearing Transcript for Feb. 27, p. 46.*

7. On March 4, 2004, the defendant filed its Motion to Quash Bindover. On March 24, 2004, the defendant filed its supporting memorandum. On April 7, 2004, the State submitted its response to the defendant's Motion to Quash Bindover.

8. During the preliminary hearing, the State presented testimony from Chief Kim Hawkes, Detective Shawn Bennett, and

Detective Jim Williamson. Through these witnesses, the State provided direct testimony of the investigation of the death of Michael Brodrero. The evidence received and considered by the Court included: (1) Several pictures of the murder scene; (2) The Medical Examiner's report of examination of Michael Brodrero stating that he died of gunshot wounds inflicted by another individual; (3) Applications for life insurance policies, made by the defendant via the internet, taken out in the name of the victim and listing the defendant as a beneficiary; (4) An application for life insurance on the victim submitted by the defendant to Shawn Iverson; (5) Voluntary statement of Shawn Iverson indicating that the defendant submitted an application for life insurance on the victim; (6) Direct testimony that the signature on the application submitted by the defendant to Shawn Iverson was a forgery and there being a high probability that the signature was forged by the defendant; (7) Statement of Marnie Christianson, the defendant's hair dresser, made to the North Park Police Department, wherein Ms. Christianson gave an account of the admissions made by the defendant to her of the defendant's plans to kill Michael Boudrero and of her commission of a burglary of a safe containing money and jewelry; (8) Sworn witness statement of Sue Davis detailing that a safe was taken from her home in Providence, Utah, that contained $6,500 in cash and miscellaneous jewelry items; (9) Business records of Globe indicating communications from the defendant, wherein she requested actions with respect to life insurance policies on Michael Boudrero, including a time where, with the assistance of the defendant, Mr. Nicholls posed as Michael Boudrero and attempted to reinstate a policy that Mr. Boudrero had previously cancelled; and (10) *Nicholls' Rule 11 Statement, Nicholls' Interview,* and *Goalen Interview* which each describe in similar and extensive details the defendant's participation in acquiring insurance policies on Michael Boudrero, of planning a ruse to lure Mr. Boudrero out to a job site in North Logan where he would be killed by Nicholls, and of disposing of the evidence after the murder was completed.

9. During the course of the Preliminary H earing, the State offered and the Court received thirty-three exhibits. The defendant only objected to the admission of six of these exhibits including: *State's Exhibit #25* (Nicholls Interview); *State's Exhibit #24* (Goalen Interview); *State's Exhibit #23* (Nicholls Rule 11 Waiver/Statement); *State's Exhibit 29* (Transcript of Marnie Christensen); *State's Exhibit 31* (Globe Message Display) and *State's Exhibit #33* (Globe Life Letter and Message Display). The rest of the remaining twenty-seven State's exhibits were offered and received by the Court without objection from the defendant.

10. On August 14, 2003, Ms. Goalen was interviewed and admonished by Detective Jacobson to tell the truth and she was further placed under oath by Kelly L. Wilburn, a Registered Professional Reporter and the interview was transcribed verbatim.

11. On November 10, 2003, Craig Nicholls pleaded guilty to Aggravated Murder, a capital felony and signed a document entitled "Notice of Plea Bargain Rule 11 Waiver/Statement of Facts." With the assistance of Mr. Nicholls, this document was prepared by Mr. Nicholls' attorneys and the State. During the change of plea hearing, Mr. Nicholls was placed under oath and was read the document and confirmed each statement of fact contained in the document as being true and accurate. The Court accepted Mr. Nicholls' plea finding that it was freely, knowingly and voluntarily made.

12. On November 12, 2003, Craig Nicholls met with Detectives Bennett and Jacobson at the Logan City Police Department for an interview. Before the interview began, Detective Jacobson admonished Mr. Nicholls that he needed to be truthful and that if he wasn't, additional charges could be brought against him. Prior to the interview, Rodney M. Felshaw, a Registered Professional report, swore in Mr. Nicholls.

13. The Court received *State's Exhibits #23, 24, and 25* finding they were reliable and admissible pursuant to Rule 1102 (b)(8)(a) and (b)(9) of the Utah Rules of Evidence. This Court finds that *Nicholls' Rule 11 Statement* was detailed, clear, under oath, and

in exchange for a lesser penalty. *Nicholls' Interview* corroborates *Nicholls' Rule 11 Statement* on most points, but in more detail, and is likewise under oath. This interview, which gives some additional detail to *Nicholls' Rule 11 Statement*, was also given after the sentencing and not before, so there was no consideration relative to whether or not it was in expectation of a lesser penalty. The detail found in *Nicholls' Statement and Nicholls' Interview* is remarkably consistent with the other evidence presented at the Preliminary Hearing and enhances its reliability.

14. The *Goalen Statement* was received and corroborated with minute details which would only be known by someone with a relationship, which raises its reliability. It was likewise under oath and not in exchange for any immunity. It was corroborated by the *Nicholls' Interview* and *Nicholls' Rule 11 Statement*. It had internal and external corroboration, as well as the interview suggested by Detective Jacobson. *State's Exhibit #1, Shaun Iverson's Statement* likewise has internal and external corroboration, as does the *State's Exhibit #26, Sue Davis' Statement*. The reliability of both of those have been established consistent with Rule 1102 and independent of that and also with respect to the testimony of Detective Bennett and Williamson. All of the testimony from the witnesses demonstrated a reliability and corroboration of the other hearsay statements received consistent with Rule 1102.

16. On July 16, 2003, Marnie Christianson called the North Park Police Department and talked with Officer John Italasano. During this conversation she disclosed information regarding the defendant's involvement in the murder of Michael Boudrero. This tape recorded conversation was copied and forwarded to the defense on August 28, 2003. On February 5, 2004, Ms. Christianson signed an affidavit and affirmed that the contents of the transcript were an accurate account of the conversation she had with Officer Italasano. During the preliminary hearing, a partial transcript of this call was offered and received by the Court into evidence. Ms. Christianson had been subpoenaed to the preliminary hearing by the defendant and available to be cross examined on her statement during the

proceedings. The defendant objected to the admission of the transcript, but never called Ms. Christianson to testify at the preliminary hearing.

17. The defendant's objection to *State's Exhibits #31 and #33* was based upon the theory that they would not be able to cross examine the caller that identified himself in the business record as Michael Boudrero. The defendant's objection was denied and the exhibits were admitted as business records.

18. In addition to its prior determination of probable cause in both case #031100633 and Case #031101017 finding that the crimes as charged were committed and that the defendant committed them, the Court additionally finds that the evidence, were it segregated to exclude the following contested evidence: *Nicholls Interview, State's Exhibit #25; Goalen Interview, State's Exhibit #25;* and *Nicholls Rule 11 Waiver/Statement, State's Exhibit #23*, the evidence is still sufficient to establish probable cause that the crimes were committed in both case #031100633 and case #031101017 as charged and that the defendant committed them.

CONCLUSIONS OF LAW:

The Court hereby makes the following conclusions of law:

1. The hearsay evidence, presented during the preliminary hearing held in the above entitled matter, was properly admitted pursuant to Article I section 12 of the Utah Constitution and Rule 1102 of the Utah Rule of Evidence.

2. The hearsay evidence submitted by the State in each instance qualified under Rule 1102(b)(8), (9) of the Utah Rules of Evidence as it was either a written, recorded, or transcribed statement, given under oath or affirmation; or was given pursuant to a notification to the declarant that a false statement made therein is punishable; or the statement had other indica of reliability.

3. The same right to confront and cross examine a witness that is provided for in a criminal trial does not exist in a preliminary hearing. The case of Crawford v. Washington, 2004 WL 413301 applies to trial proceedings and does extend the same rights of

confrontation and cross examination to a preliminary hearing.

4. The doctrine of merger is inapplicable to both case #031100633 and case #031101017. Merger does not eliminate either of the aggravating factors found in Section 76-5-202 (f) & (g) of the Utah Code, nor does it eliminate any of the charges in either case, as the statutory elements of any given charge is different than the elements required to prove any of the remaining charges.

5. The defendant has failed to support with any law its argument that Section 76-5-202(f) of the Utah Code is unconstitutional. This Court finds Section 76-5-202(f) to be constitutional as it gives adequate notice to enable ordinary people to understand what conduct is prohibited. This Court further concludes that Section 76-5-202(f), (g) does not encourage arbitrary and discriminatory enforcement.

Accordingly, it is ORDERED, that the Defendant's Motion to Quash Bindover is denied in whole.

DATED June 3, 2004.

"s/ Gordon J. Low"
District Court Judge